(27,775)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 418.

THE G. S. WILLARD COMPANY, HENRY S. NARTEN, PERRY F. NARTEN, AND W. A. DUFF, APPELLANTS,

vs.

A. MITCHELL PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, AND EDWIN S. WERTZ, AS UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1920.

1 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

Record of the Proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the Cause and Matter Hereinafter Stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 6th day of said month, in the year of our Lord One Thousand Nine Hundred and Twenty, and of the Independence of the United States of America the one Hundred and forty-fourth, to-wit, on Monday, the 21st day of June, A. D. 1920.

Present: Honorable D. C. Westenhaver, United States District Judge.

No. 553. In Equity.

THE G. S. WILLARD COMPANY et al.
vs.
A. MITCHELL PALMER et al.

Said action was commenced on the 4th day of June, A. D., 1920, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

2 *Bill of Complaint.*

Filed June 4, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 553.

THE G. S. WILLARD COMPANY, a Corporation, HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,
vs.
A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Defendants.

Bill of Complaint.

Now come the plaintiffs above named, by their solicitors, and for their cause of action against the defendants say:

I.

The plaintiff, The G. S. Willard Company, is a corporation duly incorporated and organized under the laws of the State of Ohio, having its principal place of business at the City of Cleveland in the Eastern Division of the Northern District of Ohio and is a citizen and resident thereof. The plaintiffs, Henry S. Narten, Perry F. Narten and W. A. Duff, are all citizens and residents of the Eastern Division of the Northern District of Ohio.

II.

The defendant, A. Mitchell Palmer, is the duly appointed and acting attorney general of the United States and is a citizen and resident of the State of Pennsylvania. The defendant, Edwin S. Wertz, is a citizen and resident of the Eastern Division of the Northern District of Ohio and is United States District Attorney for the Northern District of Ohio.

III.

3 This is a suit of a civil nature in equity and arises under the Constitution of the United States, in this, to-wit: This suit necessarily involves and presents for determination the question of the validity under the Constitution of the United States of an Act of Congress, approved August 10, 1917, entitled, "An Act to Provide Further for the National Security and Defense by Encouraging the Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," and the Act of Congress, approved October 22, 1919, amending said last mentioned Act and therein designated as the "Food Control and the District of Columbia Rents Act," said Act of August 10, 1917, and the amendment thereof of October 22, 1919, being known and hereinafter referred to as the "Lever" Act. If said Act be enforced against these plaintiffs by defendants, as threatened to be enforced by them, as hereinafter set forth, and as it will be enforced if enforcement thereof is not enjoined as herein prayed, such enforcement will, by reason of the facts hereinafter stated, necessarily and certainly entail upon plaintiffs and upon each of them a loss and damage greatly in excess of the sum of Five Thousand Dollars ($5,000.00) exclusive of interest and costs, all as hereinafter shown, and by reason thereof the amount in controversy in this suit exceeds as to each plaintiff the sum of Five Thousand Dollars ($5,000.00) exclusive of interest and costs.

IV.

The plaintiff, The G. S. Willard Company, was incorporated under the laws of the State of Ohio in the year 1915, and continuously since that date has been engaged in business with its headquarters at Cleveland, Ohio, and has continuously bought, sold and

distributed sugar to the Northern Ohio trade. Its principal customers are bakers, retail grocers and retail dealers in ice cream and similar products. During the year 1917 this company made gross sales of sugar approximately to the extent of $1,500,000.00; in 1918, approximately to the extent of $2,000,000.00; in the year 1919, approximately to the extent of $2,250,000.00. The
4 plaintiffs have a large sum of money invested in said business and in the course of its operation have acquired a reputation among the trade for fair dealing and a good will which is of great value. The plaintiffs have complied with all of the laws of the United States and have always done all things required of them by the laws of the United States.

V.

The plaintiff, Henry S. Narten, is President; the plaintiff, Perry F. Narten, is Vice-president; the plaintiff, W. A. Duff, is Treasurer, of the corporation plaintiff, The G. S. Willard Company. All of these individual plaintiffs at the present time are and for many years last past have been large stockholders in The G. S. Willard Company. By reason of the foregoing facts the property interest and business of the plaintiffs are so mingled and inter-related that an injury to the business of one of the plaintiffs would injuriously affect the business of each of the other plaintiffs. The business of the corporation plaintiff is largely outlined, managed and carried on by the individual plaintiffs. If the defendants carry out and do as to the said individual plaintiffs, or any of them, the things by them threatened that they will do as in this bill stated, the property and business of each and all of the plaintiffs will be seriously injured and said plaintiffs and each of them will suffer great and irreparable loss and damage for which plaintiffs and each of them have no adequate remedy at law.

VI.

That the business carried on by the plaintiff corporation and the individual plaintiffs consists of the buying of sugar and the selling of the sugar so bought as hereinbefore stated to the various bakers, retail grocers, dealers in ice cream and similar products; that at the present time practically the entire supply of sugar which these plaintiffs are able to obtain for the purpose of carrying on the busi-
5 ness as aforesaid, is bought from The American Sugar Refining Company and The Franklin Sugar Refining Company; that owing to the great scarcity of sugar at the present time, these plaintiffs can obtain sugar from no other source sufficient in quantity to enable them to carry on their business as aforesaid.

VII.

Under date of May 7, 1920, these plaintiffs received the following communication:

"New York, May 7, 1920.

To the Trade:

All contracts are subject to the rules and regulations of the United States Government in effect at the time of shipment and delivery.

Every contract must bear the customer's United States Food Administration license number, except in cases of customers who are not required to have a license by reason of doing a business of less than $100,000 per annum. In such cases the notation 'No Food Administration license required' must appear on the contract.

Sales will not be made to persons or firms whose licenses are revoked or who are under indictment by the United States Government.

THE AMERICAN SUGAR REFINING COMPANY.
THE FRANKLIN SUGAR REFINING COMPANY."

If an indictment is returned by the United States Government against these plaintiffs, these plaintiffs, or any of them, would be prevented from carrying on their lawful business; the business organization of the corporate plaintiff would be disrupted, and the individual plaintiffs would suffer great financial loss for the reason that they would not be able to obtain a sufficient supply of sugar to continue their legitimate business. Many bakers, grocers and dealers in ice cream and similar products rely on their supply of sugar from the plaintiffs herein. If the supply of sugar of the plaintiffs is cut off or if their business is disrupted, not only will the customers of the plaintiffs suffer great loss and damage but the public generally will suffer great damage and hardship as a result of their inability to obtain their supply of sugar from those who deal with the aforesaid plaintiffs.

6

VIII.

Plaintiffs are advised and therefore allege the fact to be that Section 4 of the Act of Congress, commonly known as the Lever Law, and Section 2 of the amendatory Act of 1919, said provisions being the only ones of such Act or of the amendment thereto having to do with the sale of sugar and upon which any indictment returned against these plaintiffs would necessarily have to be predicated, are unconstitutional and void because of the following and other reasons:

(a) The said Lever Law and said amendatory Act of 1919 were enacted by Congress in the attempted exercise of the so-called war powers conferred and delegated to Congress by the Constitution of the United States and the enactment of the aforesaid provisions and each of them was at the time of the enactment thereof beyond the power of Congress. Said provisions of said Lever Law and of said amendatory Act of 1919 must be construed as being limited in their application to acts which would affect and interfere with the successful prosecution of the war or the preparation of the national defense or must be held to be beyond the war power of Congress, and said provisions and each of them, if tested and construed solely ac-

cording to the language therein found, in no way relate to the exercise of any of the war powers and are in violation of the Tenth Amendment of the Constitution.

On October 22, 1919, the date when the amendatory Act of 1919 was passed and approved, there existed no situation calling into play war powers of Congress and particularly none authorizing or permitting the exercise of such powers in respect to the particular matters which were the subject of said legislation. As a consequence, said amendatory act was and is wholly beyond the power of Congress and is in conflict with the Tenth Amendment of the Constitution of the United States.

7 Both said Lever Law and said amendatory Act of 1919 expressly asserted as the reason of and ground for their enactment that it was "essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy" and by Section 24 of said Lever Law, it was expressly provided that "the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated." On October 22, 1919, when said amendatory Act of 1919 was passed and approved, and prior thereto, the state of war between the United States and Germany had actually terminated, the Army and Navy had been demobilized and reduced to a peace basis and there existed no situation calling into play the war powers of Congress to enact, as it thereby attempted to do, that an act declared unlawful in Section 4 of said Lever Act, as originally passed, and which was not therein declared to be a crime or punishable as such, was, if committed thereafter, to constitute a crime and be punishable by fine or imprisonment.

(*b*) Said provisions and portions of said Lever Law herein referred to and of said amendatory Act of 1919 are, and each of them is so vague, indefinite and uncertain that they cannot have the force and effect of law within the meaning of the Constitution of the United States and particularly of the Fifth Amendment thereof, or be enforced by the Courts.

(*c*) The aforesaid sections of said Lever Law and of said amendatory Act of 1919 are unconstitutional and void because the exaction of a fine or penalty under the provisions thereof would constitute the taking of property or the deprivation of liberty without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

(*d*) The prosecution and punishment of a person under the aforesaid provisions of said Lever Law and of said amendatory
8 Act of 1919 would be in violation of the Sixth Amendment of the Constitution of the United States, which requires that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him.

(*e*) Said provisions of said Lever Law and of said amendatory Act of 1919 do not furnish any standard or rule or guide or basis for

determining what are necessaries or what are excessive prices or what is the meaning of the phrase, "to engage in any discriminatory and unfair or any deceptive or wasteful practice or device," or what is meant by the phrase, "to restrict the supply of any necessaries" or the phrase, "to restrict the distribution," or for determining what are "unjust" or "unreasonable" "rate" or "charge," all as used in said Act, and said words and phrases so used have no definite and established meaning.

(*f*) The aforesaid provisions of said Lever Law and of said amendatory Act of 1919, in so far as they attempt to make it a crime "to make any unjust or unreasonable rate or charge in handling or dealing in or with necessaries" or in so far as they attempt to make it a crime to conspire to charge "excessive prices," are unconstitutional and void for the reason that it is an unconstitutional delegation of legislative power to vest the function of fixing prices in a court or jury.

(*g*) The aforesaid sections of said Lever Law and of said amendatory Act of 1919 do not define the offenses thereby denounced as crimes and for which severe punishment and penalties are thereby provided, but leave the definition thereof to the varying opinions of judges and juries in trials after the fact, making said provisions necessarily ex post facto laws, in conflict with Article I, Section 9, Subdivision 3, of the Constitution of the United States.

(*h*) The classification made in Section 4 of said Lever Law, as amended by Section 2 of said amendatory Act of 1919,
9 whereby those engaged in certain occupations, pursuits and businesses are wholly exempt from the operation thereof, is unjust, unreasonable and arbitrary and render said section unconstitutional and void, in that penalties inflicted under said section would deprive any person convicted thereunder of their property and rights without due process of law.

IX.

Plaintiffs show that in spite of the fact that the aforesaid provisions of said Lever Law and of said amendatory Act of 1919 are unconstitutional and void, said defendants, Palmer and Wertz, and their assistants, have threatened to return an indictment or indictments under the provisions of the Lever Act and the amendatory Act of 1919 against these plaintiffs and have threatened to cause warrants to be issued for their arrests, said indictments and warrants being wholly based upon said void and unconstitutional provisions of the Lever Act aforesaid and being but one of a series of steps proposed and threatened by the defendants for the enforcement of said unconstitutional law. Plaintiffs say that the return of indictments against them or any of them for alleged violation of said Lever Act or the amendatory Act of 1919 or the prosecution by the defendants of these plaintiffs for alleged violation of said Acts, will result in said plaintiffs being totally unable to purchase the sugar that is

necessary to be purchased by them in order that they may carry on their said business and supply their customers as aforesaid, and that thereby their business will be destroyed and they will suffer great and irreparable injury; and that the return of indictments against them or the commencement of prosecutions against them, as aforesaid, will impose upon and cause the plaintiffs herein great and irreparable injury, in that said plaintiffs will be subjected to continuous and repeated harrassment and that said plaintiffs will,
10 by reason of said indictment and prosecution, be subjected to great humuliation and unfavored publicity and will as a result thereof, lose many of their customers and much of their business and will be deprived of the good will which they have built up and now own in said business.

X.

The plaintiffs show that each and every sale of sugar made by plaintiffs or any one of them might be held by a court or jury in a prosecution under the aforesaid provisions of said Lever Law or said amendatory Act of 1919, to be a violation thereof and to constitute a separate offense for which the plaintiff, making said sale, might be subjected to the heavy fines and penalties provided for in said Acts respectively; that the plaintiffs are constantly engaged in selling sugar in open competition and at ruling prices; that the cost to them of obtaining sugar varies at different times and the sale price in open competition varies from time to time; that it is absolutely impossible for the plaintiffs or any of them or any of their officers or agents to determine or ascertain from the provisions of the Acts of Congress above mentioned, what is an unjust or unreasonable or excessive price for sugar, and the said individual plaintiffs above named, the officers and representatives of the corporation plaintiff are in peril of criminal prosecution based upon the said Acts of Congress hereinbefore referred to. Said plaintiffs aver that they have at no time made excessive or unreasonable profits; that during the year 1918, the profits derived from the business amounted to $7,000.00 upon sales of sugar of $1,750,000.00, and in 1919, on sales of sugar of $2,000,000.00, the profits amounted to $11,000.00; that these plaintiffs do not know what prices are in violation of the aforesaid provisions of said Acts of Congress, or whether or not the prices at which they are daily selling sugar may be held to violate said provisions, the result of which is that it is impossible for the plaintiffs to carry on their business without having their agents and officers and
11 themselves daily and hourly take the risk and peril of criminal prosecution and the normal and orderly and proper conduct of the business of the plaintiffs is interrupted and interfered with, to the great and irreparable loss and damage of said plaintiffs and each of them.

All of the foregoing shows that the plaintiffs herein and each of them will be subjected to great and irreparable injury by the prosecution of the individual plaintiffs named herein or the return of an indictment against any of the plaintiffs named herein or any such other proceedings as are threatened to be instituted by the defend-

ants as aforesaid, unless said defendants are restrained and enjoined as herein prayed.

Wherefore, plaintiffs pray that upon the filing of this bill the court issue a restraining order for a period not to exceed ten days, restraining the defendants and each of them from signing any indictment or from filing any indictment with the Clerk or other official of this court, based upon the provisions of Section 4 of the Lever Act or the amendatory Act of October 22, 1919; that the defendants and each of them, their assistants, agents and representatives, be restrained from arresting or causing to be arrested any of the individual plaintiffs hereto, or in any way arresting or threatening to arrest any of the plaintiffs or any of their officers or employees by means of said Lever Act or their enforcement thereof by criminal or civil proceedings; that the motion of the plaintiffs for a temporary injunction herein be set down for hearing at an early date; that upon the hearing of said motion a temporary injunction be granted, restraining said defendants, their assistants, agents and representatives, as hereinbefore prayed, until final hearing of this suit, and that upon final hearing, said temporary injunction be made permanent.

Plaintiffs further pray that the aforesaid provision of said
12 Act of Congress, passed and enforced August 10, 1917, commonly known as the Lever Law, and the amendatory Act passed and enforced October 22, 1919, be declared null and void as being in violation of the Constitution of the United States, and particularly the Fifth, Sixth, and Tenth Amendments thereof.

That defendants and each of them may be required to answer this bill of complaint but not under oath, answer under oath being hereby expressly waived.

And plaintiffs further pray that they may have such other and further relief as the court may determine just and proper.

CALFEE, FOGG & WHITE,
DAY, DAY & WILKIN,
Solicitors for Plaintiffs.

WILLIAM L. DAY,
J. G. FOGG,
Of Counsel.

STATE OF OHIO,
Cuyahoga County, ss:

Perry F. Narten, being duly sworn, on his oath deposes and says that he is one of the plaintiffs named in the foregoing bill of complaint; that he is Vice-president of the plaintiff, The G. S. Willard Company; that he is duly authorized by said corporation to make this oath; that he has read the foregoing bill of complaint; that the statements therein contained are true except as to allegations therein made on information and belief and as to such allegations, he believes them to be true.

PERRY F. NARTEN.

Sworn to before me and subscribed in my presence this 26th day of May, A. D. 1920.

JAMES J. LAUGHLIN,
Notary Public.

13 *Subpœna.*

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon A. Mitchell Palmer, as Attorney General of the United States, citizen of and resident of the State of Pennsylvania, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, citizen of and resident of the State of Ohio, if they be found in your district, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them by The G. S. Willard Company, Henry S. Narten, Perry F. Narten, W. A. Duff, citizens of and resident in the State of Ohio.

Hereof they are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits and the Honorable D. C. Westenhaver, District Judges of the United States, this 4th day of June, A. D. 1920, and in the 144 year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
Clerk,
By ANNA H. ELLIOTT,
Deputy Clerk.

Memorandum.

The said defendants required to file their answer or other defense in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

B. C. MILLER,
Clerk.

14 Endorsement, when issued: No. 553. U. S. Marshal's No. 9286. United States District Court, Northern District of Ohio, The G. S. Willard Company et al. vs. A. Mitchell Palmer, etc., Edwin S. Wertz, etc. Subpœna in Equity. Return Day June 24, 1920. $25.00 deposited by plaintiff for costs. Day, Day & Wilkin, Complainant's Attorney. Filed June 9th, 1920. B. C. Miller, Clerk U. S. District Court N. D. O.

Endorsement when returned: U. S. Marshal's Office, Washington, D. C., June 8th, 1920. Served copy of the within Subpœna together with a copy of Bill of Complaint in said case on A. Mitchell Palmer, Attorney General of the United States, personally, June 7, 1920. Maurice Splain, U. S. Marshal, District of Columbia. R.

15 *Subpœna.*

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon A. Mitchell Palmer, as Attorney General of the United States, citizen of and resident of the State of Pennsylvania, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, citizens of and resident in the States of Ohio, if they be found in your district, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them by The G. S. Willard Company, Henry S. Narten, Perry F. Narten, W. A. Duff, citizens of and resident in the State of Ohio.

Hereof they are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits and the Honorable D. C. Westenhaver, District Judges of the United States, this 4th day of June, A. D. 1920, and in the 144 year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
Clerk,
By ANNA H. ELLIOTT,
Deputy Clerk.

Memorandum.

The said defendants required to file their answer or other defense in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

B. C. MILLER, *Clerk.*

16 Endorsement: No. 553. U. S. Marshal's No. 9286. United States District Court Northern District of Ohio. The G. S. Willard Co. et al. vs. A. Mitchell Palmer, Edwin S. Wertz. Subpœna in Equity. Return Day June 24, 1920. $25.00 deposited by plaintiff for costs. Day, Day & Wilkin, Complainant's Attorney-. Filed June 10, 1920. B. C. Miller, Clerk U. S. District Court, N. D. O.

Endorsement when returned:

U. S. Marshal's Return.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, June 4th, 1920, and on the 8th day of June, 1920, at the same place I served it on the within named Edwin S. Wertz, by delivering to him personally a true and certified copy with all endorsements thereon. The within named A. Mitchell Palmer could not be found in my district.

CHAS. W. LAPP,
U. S. Marshal.
LOUIS WILCOX,
Deputy.

Marshal's Fees:

Travel	.06
Service	2.00
	2.06

17 (Heard on application for temporary restraining order and submitted — entered June 5th, 1920, by Judge Westenhaver.)

No. 553. Equity.

WILLARD COMPANY

vs.

A. MITCHELL PALMER, etc., et al.

This day this cause came on to be heard on the application of temporary restraining order and was argued by counsel, submitted to the Court and taken under advisement by the Court.

18 *Motion to Dismiss Bill of Complaint.*

Filed June 15, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for The Northern District of Ohio, Defendants.

Motion to Dismiss Bill of Complaint.

The defendant herein, Edwin S. Wertz, United States Attorney, for the Northern District of Ohio, appearing in this action in response to service issued by the Court, and reserving the right to make further answer to the Bill of Complaint herein now respectfully moves this Honorable Court that the Bill of Complaint of the Plaintiffs filed herein be dismissed by order of this Court, for the following reasons, and each of them, severally and separately, to-wit:

1. This action is a civil suit in Equity wherein Plaintiffs, seek to enjoin defendant, as an officer of the United States, sworn and charged, from further performing his several duties in the prosecution of crimes and offenses committed against the United States in the Northern District of Ohio, particularly violations of the Act of Congress approved August 10, 1917, as amended by the Act of Congress approved October 22, 1919, and this Court is without jurisdiction as a Court of Equity to entertain, hear or determine any of the matters and things set forth in said Bill of Complaint.

19 2. This action is a civil suit in Equity wherein plaintiffs seek to enjoin the defendant, an officer of the United States, sworn and charged from further performing his several duties in the prosecution of crimes and offenses committed against the United States in the Northern District of Ohio, particularly violations of the Act of Congress approved August 10, 1917, as amended by the Act of Congress approved October 22, 1919, and this Court, sitting as a Court of Equity, is without equitable power to grant the relief prayed for in said Bill of Complaint.

3. This action is one merely to enjoin the return of an indictment by a Federal Grand Jury and the contemplated prosecution of a criminal offense committed against the United States, no indictment against the plaintiffs being pending in this Court, and no property rights of either or all of the plaintiffs herein are shown to be involved in said prosecution, other than except the possible infliction

of a fine, in the event of the return and filing of an indictment by a Federal Grand Jury against the plaintiffs, and in the event of the conviction of the plaintiffs upon such an indictment, in the event an indictment is returned and filed against the plaintiffs named herein, and that, therefore, this Court, sitting as a Court of Equity, has no jurisdiction to entertain, hear or determine the matters and things set forth in the Bill of Complaint herein and is without power to grant the relief prayed for in said Bill of Complaint.

4. The pleas contained in the Bill of Complaint filed herein do not entitle plaintiffs, or either of them separately or severally, to equitable relief and should be dismissed for want of equity.

5. This action is against officers of the United States of America, as representing the action, the liability and responsibility of the United States of America, to stop and prevent the United States of America from proceeding to prosecute by indictment the
20 individual plaintiffs for a violation of Federal Statutes and the action is against the United States of America, although the United States of America is not a party to the record, but is the real party in interest, and the only real party against which alone, in fact, the relief prayed for in this Bill of Complaint, is asked against which the judgment or decree prayed for in said Bill of Complaint would operate, and plaintiffs have not, by plea or otherwise, shown that the United States of America has directly or indirectly consented to the prosecution of this action nor has the United States of America consented to the prosecution of this action, or to be sued by either of the plaintiffs herein.

Wherefore, defendants pray for an order of Court herein dismissing plaintiffs' Bill of Complaint.

Respectfully submitted,

E. S. WERTZ,
United States Attorney, Northern District of Ohio.

21 *Memorandum Opinion.*

Filed June 18, 1920.

In the District Court of the United States for the Northern Division of Ohio, Eastern Division.

In Equity. No. 553.

THE G. S. WILLARD COMPANY et al., Plaintiffs,

vs.

A. MITCHELL —— et al., Defendants.

WESTENHAVER, *District Judge:*

The plaintiff, The G. S. Willard Company is a wholesale dealer or jobber in sugar, having its principal office and place of business

at Cleveland, Ohio. The individual plaintiffs are officers and stockholders in the company. This bill is filed against the Attorney General of the United States and the United States District Attorney for the Northern District of Ohio, alleging that the defendants are threatening with indictment and criminal prosecution all the plaintiffs, for sales made of sugar in violation of the provisions of Section 4 of the Lever Act as amended by an Act approved October 22, 1919. The case has been heard upon plaintiffs' application for preliminary injunction and on defendants' motion to dismiss the bill for want of equity. Full consideration has been given to the arguments of counsel, and an examination has been made of the numerous authorities cited. As a result of this consideration, I am of opinion that plaintiffs' application for a preliminary injunction should be, and it is, denied, and that defendants' motion to dismiss plaintiffs' bill for want of equity should be, and is, sustained. A memorandum giving my reasons for these conclusions will be filed later.

D. C. WESTENHAVER,
Judge.

Cleveland, Ohio, June 18, 1920.

22 *Final Decree.*

Entered June 21, 1920, by Judge Westenhaver.

No. 553. Equity.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEX, PERRY F. NARTEX, W. A. DUFF

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio.

This cause came on to be heard at this term on the bill of complaint of the plaintiffs and the application of the plaintiffs for a temporary injunction and the motion of the defendant, Edwin S. Wertz, United States attorney for the Northern District of Ohio, to dismiss the bill of complaint, and the same was argued by counsel and thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows, namely:

(1) That the application for a temporary injunction be and the same is hereby refused;

(2) That the motion to dismiss the bill of complaint be and the same is hereby sustained;

(3) That the bill of complaint for injunction be and the same is hereby dismissed at the cost of the plaintiffs, to which order and each and every part thereof, the plaintiffs, by their counsel, then and there in open court objected and excepted.

23 *Petition for Appeal.*

Filed June 21, 1920.

In the Supreme Court of the United States.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Appellants.

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Appellees.

Petition for Appeal.

Come now The G. S. Willard Company, a corporation, Henry S. Narten, Perry F. Narten and W. A. Duff and represent to this honorable court that in the above entitled case, which is a cause pending in the United States District Court for the Eastern Division of the Northern District of Ohio, the defendants in error or appellees, being the defendants below, secured a judgment and decree of the court dismissing the complaint herein for want of equity.

Your petitioners respectfully represent that they filed their bill of complaint herein on the 4th day of June, 1920, and thereupon made application to the United States District Court for the Northern District of Ohio for a temporary restraining order. On the same date the Assistant United States Attorney for the Northern District of Ohio gave notice of the defendants' intention to file a motion to dismiss the bill of complaint. On the 15th day of June, the defendant, Edwin S. Wertz, United States Attorney for the Northern District of Ohio, filed a motion to dismiss the bill of complaint herein. The cause was thereupon submitted to
24 the United States District Court for the Northern District of Ohio on the application for a temporary injunction and the motion of the defendant, Edwin S. Wertz to dismiss the bill of complaint. Thereupon after argument of counsel and consideration of the cause submitted, said United States District Court for the Eastern Division of the Northern District of Ohio refused the application for the temporary injunction and sustained the motion to dismiss the bill of complaint and rendered a decree against the plaintiffs which was entered on the 21st day of June, 1920. The plaintiffs in the United States District Court, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, duly excepted to the action of the court in refusing said temporary injunction and in sustaining said motion to dismiss and in dismissing their bill of complaint herein and prayed an appeal to the Supreme Court of the United States. The said United States District Court for the Eastern Division of the Northern District of Ohio in said decree, above referred to, held that the bill of complaint herein did

not state a cause of action in equity and that the said The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, were not entitled to the relief prayed for and thereby held that the Act of Congress, especially Section 4 of the act entitled, "An act to provide further for the National Security and Defense by Encouraging the Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," approved August 10, 1917, and the Act of Congress amending said Section, especially Section 2 of said Act, approved October 22, 1919, which act was entitled, "Food Control and District of Columbia Rents Act," all of said legislation being commonly referred to as the Lever Act, was not in conflict with the Fifth and Sixth Amendments of the Constitution of the United States. The final order of the court, decreeing and adjudging that said bill of complaint should be dismissed, was made on June 21, 1920. The appellants herein resisted said decree and judgment of the court on the ground that the said Acts of Congress were void because in conflict with Amendments Nos. Five and Six of the Constitution of the United States, in that said acts of Congress deprived The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff of their liberty of contract and property without due process of law and took their private property for public use without just compensation.

Said suit was founded essentially upon the allegations that Section 4 of the Act of Congress, known as the Lever Act, as amended October 22, 1919, was unconstitutional, being violative of various provisions of the Constitution and its Amendments, as fully set forth in said bill of complaint and that the enforcement of said act against appellants would work great and irreparable injury which could only be avoided by the injunctive process of the court.

That Edward S. Wertz, United States Attorney for the Northern District of Ohio, has notified counsel for appellants that the Grand Jury now in session for the Eastern Division of the Northern District of Ohio will on the 28th day of June, 1920, return an indictment against the appellants for violation of the terms and provisions of Section 4 of the Lever Act as amended October 22, 1919, and that he proposes to proceed in the usual and customary manner with the prosecution of the appellants under said indictment.

That in the present situation, in case the appellees are allowed to proceed with the prosecution and the return of the indictments and the trial of the appellants under said indictments and the Supreme Court should thereafter sustain appellants in their contentions as to the unconstitutionality of said Lever Act and should reverse the judgment of the United States District Court holding said Acts constitutional, the judgment of the Supreme Court would be and become wholly ineffectual and practically inoperative, as the acts which appellants seek to enjoin permanently would have permitted and their consequences could not be recalled or remedied and the injury and damage to plaintiff and its property and property rights would be wholly irreparable and such damages would be incapable of ascertainment or recovery against the United States if they could be ascertained.

26 That within the past few weeks there have been handed down by various United States judges and by the Circuit Court of Appeals of the Second Circuit to the extent of about twenty decisions, *to* counsel for the appellants are informed, nearly equally divided, holding said provisions of said Lever Act here involved valid, and the remaining decisions holding the same unconstitutional, and in some of said cases preliminary and permanent injunctions against the United States Attorneys have been granted; in others, refused; in others, relief in other forms granted or denied; all involving as the vital question the constitutionality or unconstitutionality of said provisions of said Lever Act.

That appeals or writs of error from many of said decisions are pending in the Supreme Court and several of them have been advanced for hearing before the Supreme Court on October 11, 1920, to insure a prompt settlement of the important questions involved and to do away with the confusion and uncertainty resulting from said conflicting decisions, by reason of which various persons in the districts in which their contention as to the unconstitutionality of the said law has been sustained have and will continue to have a great and unfair advantage over other persons in districts in which said law has been held constitutional and the prosecutions are continuing and in which very heavy fines and terms of imprisonment have already been imposed.

That the important, vital and decisive question in the above entitled suit, namely, the asserted invalidity and unconstitutionality of Section 4 of said Lever Act, as amended, is the same as that involved in the various conflicting decisions of the United States District Courts and the Circuit Court of Appeals, above referred to, and in the suits from which appeals have been taken and others doubtless are to be taken to this court as above set forth and as is involved in the cases before this court, the hearing of which has been advanced to October 11, 1920, in the Supreme Court, as likewise above stated, and appellants in this case are willing and anxious
27 to have the submission and argument of this case advanced to the earliest possible date to which this court will consent and to said October 11, 1920, if permitted so to do.

Wherefore, appellants herein pray for an order that during the pendency of the said appeal from the final decree herein to this court and until its determination, all proceedings under the decree as appealed from be stayed and said appellees restrained and enjoined from taking further proceedings against the appellants, as described in the bill of complaint herein, from filing any indictment against the appellants and from instituting any further hearings or proceedings looking to the indictment, apprehension or trial of the appellants or its officers or agents for any alleged violation of Section 4 or Section 4 as amended, of said Lever Act and that said appellants have such further or different relief as may be just and proper.

WILLIAM L. DAY,
JOSEPH G. FOGG,
Solicitors and Counsel.

28

Assignment of Errors.

Filed June 21st, 1920.

In the Supreme Court of the United States.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Appellants,

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Appellees.

Assignment of Errors.

Now come the appellants and petitioners, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, and file herein the following assignment of errors appearing upon the record in this cause, which said appellants and petitioners aver occurred upon the trial of said cause and for which the judgment should be reversed:

(1) The court erred in holding that the Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was valid, as against the appellants herein.

(2) The court erred in holding that the Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was valid as against the appellants herein.

29 (3) The court erred in holding and decreeing that the said Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Amendment No. Five of the Constitution of the United States and therefore void.

(4) The court erred in holding and decreeing that the Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Amendment No. Five of the Constitution of the United States and therefore void.

(5) The court erred in holding and decreeing that the said Act of Congress, approved August 10, 1917, especially Section 4 of said Act,

which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Amendment No. 6 of the Constitution of the United States and therefore void.

(6) The court erred in holding and decreeing that said Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Amendment No. Six of the Constitution of the United States and therefore void.

(7) The court erred in holding and decreeing that said Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Article I, Section 9, Subdivision 3 of the Constitution of the United States.

(8) The court erred in holding and decreeing that said Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Article I, Section 9, Subdivision 3 of the Constitution of the United States.

(9) The court erred in dismissing the bill of complaint of the appellants herein for want of equity and in rendering a decree against said appellants for costs.

Wherefore, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, petitioners and appellants in this appeal pray that the judgment and decree of the United States District Court for the Eastern Division of the Northern District of Ohio, rendered on the 21st day of June, 1920, against The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, dismissing their bill of complaint, be reversed and that said cause be remanded to the court below for further proceedings as may be proper to be taken therein under the laws of the United States and the directions of this court.

THE G. S. WILLARD COMPANY,
HENRY S. NARTEN,
PERRY F. NARTEN,
W. A. DUFF,
Plaintiffs.
By WILLIAM L. DAY,
J. G. FOGG,
Their Solicitors and Counsel.

31

Order Allowing Appeal.

Entered June 21, 1920, by Judge Westenhaver.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio.

On this 21st day of June, 1920, came The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, by their counsel, and presented herein their petition for appeal and also presented an assignment of errors in the same, which petition upon consideration of the court is hereby allowed, and the court herein allows an appeal to the Supreme Court of the United States upon the filing of a bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety, to be approved by this court.

The said appeal is hereby granted to the said The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, from the decree and judgment of the court dismissing, for want of equity, the bill of complaint herein.

32 It is further ordered that the clerk of this court make out immediately and send to the clerk of the Supreme Court of the United States under the seal of this court all the records and proceedings and all things concerning the judgment and decree above referred to, together with this order allowing this appeal and that said records be transmitted to said clerk of the Supreme Court of the United States at the City of Washington, District of Columbia, to the end that if any error be in the judgment and decree of this court that said Supreme Court of the United States may cause further to be done in said matter to correct said error, if error there be in dismissing said bill of complaint.

33

Bond.

Filed June 22, 1920.

Bond on Writ of Error or Appeal.

Know all Men by these Presents, That we The G. S. Willard Company, a corp., Henry S. Narten, Perry F. Narten and W. A. Duff as principal, and Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto A. Mitchell Palmer as Attorney General of the United States, Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said A. Mitchell Palmer as Attorney General of the U. S. and Edwin S. Wertz, as

U. S. District Attorney for the Northern District of Ohio their certain attorneys, executors, administrators, successors or assigns: to which payment will and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said Court, between The G. S. Willard Company, a corp., Henry S. Narten, Perry F. Narten and W. A. Duff, Plaintiffs and A. Mitchell Palmer as Attorney General of the U. S. Edwin S. Wertz, as U. S. District Attorney for the Northern District of Ohio, Defendants, a decree was rendered against the said Plaintiffs and the said Plaintiffs having obtained an order allowing appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the — A. Mitchell Palmer as Attorney General of the U. S. and Edwin S. Wertz, as U. S. District Attorney for the Northern District of Ohio, defendants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C. on the 21st day of July next.

Now the condition of the above obligation is such, That if the said Plaintiffs shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE G. S. WILLARD COMPANY.
By HENRY S. NARTEN,
President.
HENRY S. NARTEN.
PERRY F. NARTEN. [SEAL.]

W. A. DUFF.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By E. B. BERKELEY, [SEAL.]
Attorney in Fact.

Sealed and Delivered in Presence of

J. G. FOGG.
B. C. MILLER.

[SEAL.]

Approved by

D. C. WESTENHAVER,
United States District Judge.

34 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To A. Mitchell Palmer, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 21″ day of July next, pursuant to a petition for appeal, filed in the Clerk's Office of the District Court of the United States for the Northern District of Ohio, wherein The G. S. Willard Company, a Corporation, Henry S. Narten, Perry F. Narten, W. A. Duff, are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 21″ day of June in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty fourth.

[Seal of the District Court, Northern Dist. of Ohio.]

D. C. WESTENHAVER,
Judge of the District Court.

34½ *U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, June 21*th* 1920, and on the 22nd day of June, 1920, at the same place. I served it on the within named, Edwin S. Wertz. By delivering to Joseph C. Brightenstein Assistant U. S. Att'y, a true and certified copy hereof, with all endorsements thereon.

CHAS. W. LAPP,
U. S. Marshal,
By D. J. CONNOR,
Deputy.

Marshal's Fees:
Travel.... .12
Service... 2.00
$2.12

Mar. No. 9286.

* Not exceeding 30 days from day of signing.

35

Precipe for Transcript.

Filed June 22, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 553. Equity.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Defendants.

Precipe.

To the Clerk:

Kindly prepare a transcript of record of the above entitled case for appeal to the Supreme Court of the United States. Include therein:

1. Copy of the bill of Complaint.

1*a*. Subpœnas and returns thereon.

2. Copy of the motion to dismiss.

3. Copy of the decree sustaining said motion to dismiss.

4. Copy of the petition for appeal to the United States Supreme Court.

5. Assignment of errors.

6. Copy of order allowing appeal.

7. Copy of bond on appeal.

8. Memorandum opinion of the court in sustaining the motion to dismiss.

9. All other docket journal entries made in said cause in the United States District Court for the Northern District of Ohio.

10. Citation.

36 And we would kindly ask that this transcript of record be transmitted at once to the clerk of the United States Supreme Court, Washington, D. C., all in conformity with the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

G. S. WILLARD CO.,
HENRY S. NARTEN,
PERRY F. NARTEN,
W. A. DUFF,
Plaintiffs,
By WILLIAM L. DAY,
J. G. FOGG,
Solicitors and Counsel.

Receipt of above precipe acknowledged by receipt of copy thereof this 21st day of June, 1920.

____ ____,
United States Attorney for the Northern District of Ohio.

STATE OF OHIO,
Cuyahoga County, ss:

William L. Day, being first duly sworn, deposes and says that at 4:45 p. m., June 21st, he personally served Harry S. Eastman, Assistant United States Attorney for the Northern District of Ohio, with the within Precipe and left with him a copy thereof, said service having been made at the office of the United States Attorney for the Northern District of Ohio at the Federal Building, Cleveland, Ohio, Edwin S. Wertz, United States Attorney, being absent from the City.

WILLIAM L. DAY.

Sworn to before me and subscribed in my presence this 22 day of June, 1920.

[SEAL.]

F. MORTEN,
Notary Public.

37 *Certificate of Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing typewritten pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the precipe for transcript filed herein, the originals of which remain in my custody as clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, in said District, this 22nd day of June, A. D. 1920, and in the 144th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,
Clerk,
By ANNA H. ELLIOTT,
Deputy Clerk.

Endorsed on cover: File No. 27,775. No. Ohio D. C. U. S. Term No. 418. The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, appellants, vs. A. Mitchell Palmer, as Attorney General of the United States, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio. Filed June 23d, 1920. File No. 27,775.

No. 418.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

THE G. S. WILLARD COMPANY, HENRY S. NARTEN, PERRY F. NARTEN, AND W. A. DUFF,
Appellants,

vs.

A. MITCHELL PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, AND EDWIN S. WERTZ, AS UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO,
Appellees.

MOTION BY THE APPELLANTS TO ADVANCE.

DAY, DAY & WILKIN,
CALFEE, FOGG & WHITE,
Solicitors for Appellants.

WILLIAM L. DAY,
JOSEPH G. FOGG,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

THE G. S. WILLARD COMPANY, HENRY S. NARTEN, PERRY F. NARTEN AND W. A. DUFF,
Appellants,

vs.

A. MITCHELL PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, AND EDWIN S. WERTZ, AS UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO,
Appellees.

No. 418.

MOTION BY THE APPELLANTS TO ADVANCE.

Comes now counsel for the appellants, and respectfully move the advancement of the above entitled cause for early hearing during the October, 1920, term of this Court.

The appellants, on the 4th day of June, 1920, filed their bill of complaint against the appellees in the United States District Court for the Northern District of Ohio, Eastern Division, asking for an injunction on the grounds that they were threatened with prosecution by the defendants under the provisions of Section 4 of the Lever Law as amended, that the threatened prosecutions would practically destroy their business, and that the provisions of the law in question were unconstitutional and void.

The sections of law referred to were Section 4 of the Act of August 10, 1917, C. 53 (40 Stat. 277), commonly known as the Lever Act as amended by the Act of October 22, 1919, Title I, Section 2 (41 Stat. 298) declaring it unlawful for any person "to make any un-

just or unreasonable rate or charge in handling or dealing with any necessaries," and authorizing fine or imprisonment, or both, for violation of its terms.

The District Court refused the application for a temporary injunction and sustained a motion to dismiss filed on behalf of the defendants below, whereupon the case was appealed to this Court and application made to Mr. Justice Pitney, in vacation, for a stay, which was refused.

Many Federal Courts have upheld the constitutionality of said Section 4 as amended, while many courts have held the same section to be unconstitutional. In the cases wherein the section was held to be unconstitutional, the United States has appealed and has filed motions to advance. As a result of the varied holdings of the District Courts there is much uncertainty and confusion in cases under the Lever Law, to the embarrassment of both the public and the government. It is therefore important that an early hearing may be had in this case.

The Solicitor General of the United States has indicated that he concurs in this request for advancement.

WILLIAM L. DAY,
JOSEPH G. FOGG,
Solicitors for Appellants.

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In the Supreme Court of the United States

THE G. S. WILLARD COMPANY, a corporation, HENRY S. NARTEN, HARRY F. NARTEN and W. A. DUFF,

Appellants,

vs.

A. MITCHELL PALMER, as Attorney General of the United States, EDWIN S. WERTZ, as United States District Attorney for the Northern District of Ohio,

Appellees.

BRIEF OF THE APPELLANTS.

STATEMENT OF THE CASE.

This cause came on to be heard in the District Court upon the motion of the appellants for a temporary injunction on the face of the original bill of complaint and upon the motion of the appellees to dismiss said original bill.

The appellants, in support of their motion, offered the original bill, which was sworn to positively, and the defendants made no reply to the allegations therein contained, either by way of affidavit or answer. The motion to dismiss is upon the grounds that the bill showed no basis for equitable relief, that the Court could not enjoin a criminal proceeding and that the plaintiffs had an adequate remedy at law.

SUMMARY OF BILL.

PLAINTIFFS.

The G. S. Willard Company is an Ohio corporation, engaged in buying and selling sugar in Northern Ohio. Its principal customers are bakers, retail grocers and retail dealers in ice cream and similar products. The individual plaintiffs are all executive officers and all stockholders in the corporation plaintiff.

DEFENDANTS.

The defendants are the Attorney General of the United States and the United States Attorney for the Northern District of Ohio.

JURISDICTION OF THE COURT.

The matter in controversy exceeds $3,000.00, exclusive of interest and costs, and the suit involves the constitutionality of certain sections of the Lever Law, under which criminal proceedings were threatened. The bill alleges that:

> The provision of the law under which the Government officials threatened to proceed is unconstitutional and void, and also that irreparable damage would result to the plaintiffs from the prosecution of the threatened criminal proceedings.

UNCONSTITUTIONALITY OF SECTION 4 OF THE LEVER LAW.

The unconstitutionality of this section of the Lever Law is assailed upon a number of different grounds, including the following:

That the enactment of said provision was at the time of the enactment thereof beyond the power of Congress;

That said provision is so vague, indefinite and uncertain that it cannot have the force or effect of law within the meaning of the Constitution of the United States, and particularly the Fifth amendment thereof;

That it is unconstitutional and void because the execution of a fine or penalty under its provisions would constitute the taking of property or the deprivation of liberty without due process of law in violation of the Fifth amendment;

That the prosecution and punishment of a person under said provision would be in violation of the Sixth amendment to the Constitution, which requires that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him;

That the provisions of the Lever Law do not furnish any standard or rule or basis for determining what are "necessaries" or what are "excessive prices," or what is the meaning of the phrase "to limit the facilities for transporting, producing, supplying, storing and dealing in any necessaries," or what is the meaning of the phrase "to restrict the supply of any necessaries," or the phrase "to restrict the distribution," or for determining what is "an unjust" or "unreasonable" "rate" or "charge," or what constitutes "discriminatory and unfair or any destructive or wasteful practice or device in the handling or dealing in or with any necessaries," all as used in said Act, and said words and phrases so used have no definite and established meanings;

That the provisions are unconstitutional in so far as they attempt to make it a crime to charge "excessive prices," for the reason that it is an unconstitutional delegation of legislative power to vest the vocation of fixing prices in a court or a jury;

That said provisions do not define the offenses thereby denounced as crimes, but leave the determination thereof to the varying opinions of judges and juries in trials after the fact, making said provisions merely *ex post facto* laws in conflict with Article I, Section 9, subdivision E of the Constitution;

That the classifications made in Section 4 of the Lever Act, as amended by Section 2 of the Amended Act of 1919, whereby those engaging in certain occupations, pursuits and businesses are wholly exempt from the operation thereof, are unjust, unreasonable and arbitrary and render the section unconstitutional and void.

IRREPARABLE INJURY TO PLAINTIFFS' PROPERTY RIGHTS.

It appears on the face of the bill that the corporation plaintiff obtains practically its entire sugar supply from The American Sugar Refining Company and The Franklin Sugar Refining Company. Owing to the scarcity of sugar at the time the bill of complaint was filed, at that time it had to purchase its sugar supply from these companies or it would be unable to do business. Under date of May 7, 1920, the plaintiff corporation was informed that if indicted The American Sugar Refining Company and The Franklin Sugar Refining Company could make no further sales of sugar to it, so that an indictment would practically terminate the business of the plaintiffs, would not only ruin the business but subject all of the plaintiffs in the court below to all of the incidental damage resulting from an indictment returned under a law which we contend is plainly and absolutely unconstitutional and void.

FACTS ADMITTED BY DEFENDANTS.

The defendants have failed to file either an answer or affidavit denying any of the allegations of the bill and having filed a motion to dismiss based upon its face, must be held to have admitted all of the facts pleaded therein.

BRIEF OF THE ARGUMENT.

THE FEDERAL COURTS HAVE JURISDICTION TO ISSUE THE INJUNCTION PRAYED FOR ENJOINING THE PROSECUTION OF THE THREATENED CRIMINAL PROCEEDING AGAINST THE CORPORATION PLAINTIFF AND ITS OFFICERS AND EMPLOYEES.

A. IT IS WELL ESTABLISHED THAT A COURT OF EQUITY CAN ENJOIN A FEDERAL OR STATE OFFICIAL WHEN HE IS ACTING UNDER AN UNCONSTITUTIONAL STATUTE.

It seems unnecessary for us to make any argument in support of this general proposition beyond calling attention to the numerous authorities herein cited.

Jurisdiction over suits in equity against United States attorneys enjoining the prosecution of criminal proceedings by such attorneys alleged to be unconstitutional, has been sustained in the following cases:

Hannah & Hogg vs. Clyne, United States District Attorney, 263 Fed. 599.

Lamborn vs. McAvoy, U. S. District Attorney, Decision in U. S. District Court, Eastern District of Pennsylvania, decided in June, 1920.

Weed & Company vs. Lockwood, U. S. District Attorney, U. S. C. C. A. for Second Circuit, decided in May, 1920.

Detroit Creamery Co. vs. Kinnane, U. S. District Attorney, District Court of the Eastern District of Michigan, Southern Division, April, 1920.

Temple Fuel Company vs. Tedro, United States District Attorney, District Court for the District of Colorado, April, 1920.

Lewis & Son Drygoods Company vs. Tedro, United States District Attorney, District Court for the District of Colorado, April, 1920.

Wilson vs. New, United States District Attorney, 243 U. S. 332.

Hammer, United States District Attorney vs. Dagenhart, 247 U. S. 251.

Ruppert vs. Caffey, U. S. District Attorney, 251 U. S. 264.

The same doctrine has been applied to suits against other Federal officials:

Philadelphia Company vs. Stimson, Secretary of War, 223 U. S. 605—

and in suits against State officials, in spite of the express provisions of Section 720 of the Revised Statutes that Federal Courts cannot grant injunctions against proceedings in any state court.

Ex Parte Young, 209 U. S., 123.

Rast vs. Van Deman, 240 U. S., 342.

Truax vs. Raich, 239 U. S., 33.

Suits brought against United States Attorneys or other Federal officials are not suits against the United States, and it is held that suits against state officials are not suits against the state, because when a Federal or state officer is proceeding under an Act that is unconstitutional he is "stripped of his official or representa-

tive character and is subjected in his person to the consequences of his individual conduct."

The general doctrine applicable in this connection is stated succinctly in the opinion of this Court in *Ex Parte Young*, 209 U. S., 123, *supra*, where it is said, in answer to the contention that the proceeding against Young, attorney general of Minnesota, was in effect a suit against the State of Minnesota:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be inforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to inforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. *If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.* See *In re Ayers, supra*, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigations generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity." (pp. 159-160).

The contention that a suit against the Secretary of War was a suit against the United States is disposed of

in similar manner and by like reasoning by this Court in the case of *Philadelphia Company vs. Stimson, Secretary of War, Supra.*

B. THE IRREPARABLE INJURY ENTITLING THE PLAINTIFFS TO AN INJUNCTION MAY ARISE FROM AN UNLAWFUL INTERFERENCE WITH AND INTERRUPTION OF THE PLAINTIFFS' BUSINESS OR EARNINGS.

The allegations of the bill show that the threatened prosecution of the plaintiffs would cause the practical destruction of their business;

That such rights of property and such threatened damage thereto show a case for the interference of a court of equity appears from a large number of decisions of both state and federal courts, from which we cite only a few:

In *Weed & Company vs. Lockwood, U. S. Attorney for the Western District of New York, supra,* the Circuit Court of Appeals for the Second Circuit had before it on appeal a bill seeking to restrain and enjoin the defendants from taking any further proceedings upon, and subsequent to, the indictment against the plaintiff pending in the District Court for the Western District of New York and to restrain the defendant from instituting any further prosecutions under the Lever Law as amended by the Act of October 22, 1919. The bill filed in this case set forth that the plaintiff was engaged in the drygoods business and Circuit Judge Manton, in delivering the opinion of the court, said:

> "The right to maintain this action in equity to restrain the United States Attorney in a criminal prosecution is challenged. The constitutionality of the act is involved. In addition thereto, *the property rights and the reputation of the appellant are involved.* The claim is that if the act be held to be unconstitutional, the appellant will be deprived of

its property without due or any process of law; *will suffer repeated harassment and may be subject to a multiplicity of prosecutions. It would suffer a great monetary loss, its reputation would be greatly impaired, and its good will and business, which it now owns, possesses and has enjoyed, will be greatly impaired, if not entirely destroyed and thus irreparable damage will be done to it. We think that if the appellant is right in its contention that the act is unconstitutional, it may maintain this action in equity.* This court said in *Jacob Hoffman Brewing Co. vs. McElligott et al.* (259 Fed. Rep. 525):

"'A suit in equity to enjoin the United States Attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. * * * if property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States Attorney. When instituting criminal proceedings under it he is to be regarded not as representing the United States in his official capacity, but as acting individually.'

"In *Wilson, etc. vs. New et al.* (243 U. S. 332), an action, similar in form, was commenced against the United States Attorney for the Western District of Missouri. The District Court held that the so-called eight-hour railroad law was unconstitutional, but the Supreme Court reversed the decree on the ground that the law was constitutional and dismissed the bill. In the later case of *Hammer vs. Dagenhart* (247 U. S. 251) in contesting the constitutionality of an act of Congress, involving child labor, the same procedure was followed. *The Supreme Court, in both cases, considered the merits of the claim of questioned constitutionality as to each act, and, while it did not in express words approve the procedure, it did necessarily approve it, by considering the merits of the issues raised.*

"The majority of the Court are of the opinion that a direct injury to the property of the appellant here would follow if the law were declared unconstitutional, and, that if such were the case, *it might maintain this action in equity."*

Circuit Judge Hough in a concurring opinion said:

"Whether 'property rights are invaded' is a question of degree. *Yet oftentimes the degree of invasion is a test of equitable jurisdiction. Thus there is usually no difference in material kind between a single act of nuisance and a continuing nuisance.* So here,—for one making a sale a month might perhaps continue to exist in a business sense under this statute; he could find out whether he was a criminal before he was ruined. *But a retail storekeeper who cannot do a day's business without running the risk of perhaps a thousand indictments is suffering a very real invasion."*

In the above case it is, to be sure, true that the Circuit Court of Appeals held the provisions of the Lever Law there in question (Section 4 as amended) constitutional and, therefore, denied the injunction, but its declaration that a property right was involved and that there was equity jurisdiction to enjoin the criminal prosecution is none the less authoritative.

In the five cases following the courts not only held that equity had jurisdiction to enjoin the criminal proceedings but also held that the provisions of the Lever Law, under which such criminal proceedings were instituted, were unconstitutional and void.

In *Lamborn vs. McAvoy,* Judge Thompson, of the District Court of the United States for the Eastern District of Pennsylvania, rendered an opinion, to which we shall have occasion to refer again in connection with that portion of our argument dealing with the unconstitutionality of the Lever Law. We here quote only that por-

tion of the opinion which has to do with the jurisdiction of a court of equity. Judge Thompson said, in this connection:

> "This is a suit in equity brought to enjoin the United States Attorney and other officials of the United States from instituting and prosecuting criminal proceedings against the plaintiffs for alleged violations of Section 4 of the Act of August 10, 1917, as amended by the Act of October 22, 1919, which makes it a criminal offense to 'make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.'
>
> The plaintiffs, who are engaged in handling, importing, selling and distributing raw and refined sugars, aver that they are *threatened with criminal prosecution* upon the charge stated, in that they sold a large quantity of sugar at a price which it is charged is unjust and unreasonable, and that they are threatened in case of prosecution with such action upon the part of the United States Sugar Equalization Board as *would interfere with and ruin their business*: that the language of the statute by reason of being vague, indefinite and uncertain cannot be enforced by the courts without depriving the plaintiffs of their liberty and property without due process of law in violation of the Fifth Amendment to the Constitution, and that it does not inform the accused of the nature of the accusation against him and is therefore in violation of the Sixth Amendment to the Constitution.
>
> If the langauge of the statute renders it unconstitutional upon the grounds stated, it is unnecessary to consider the other grounds of unconstitutionality set up in the bill and urged at the hearing.
>
> *The facts appearing from the pleadings and affidavits are, in my opinion, sufficient to sustain equitable jurisdiction under the rule* stated by Mr. Justice Day in *Dobbins vs. Los Angeles*, 195 U. S. 223:
>
> 'It is well settled that where property rights will be destroyed unlawful interference by criminal

proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Davis & Farnum Mfg. Co. vs. Los Angeles*, 189 U. S. 207, 218, and cases therein cited.' "

See also:

Ex parte Young, 209 U. S., 123.

Philadelphia Company vs. Stimson, Secretary of War, 223 U. S. 605.

In *Detroit Creamery Company vs. Kinnane*, District Judge Tuttle of the Eastern District of Michigan, Southern Division, in sustaining a bill for an injunction against threatened prosecutions under Section 4 of the Lever Law stated the substance of the bill of complaint filed by the Creamery Company and others who were engaged in the business of purchasing milk from producers and preparing the same for resale distribution to consumers within the City of Detroit, which bill alleged:

"* * * that plaintiffs had in their employ upwards of five hundred milk salesmen selling their milk at retail to householders and consumers daily and that the fines capable of being levied or claimed rightfully to be levied on one day's transactions against such salesmen would aggregate millions of dollars * * * that by reason of the *aforesaid threats* of the defendants against plaintiffs, said milk salesmen would not continue to deliver milk at lawful prices and as a result of the claimed and usurped authority of the defendants, unless restrained, *the business of ths plaintiffs would be irreparably injured and destroyed;* * * * that the threatened criminal prosecution referred to would involve the plaintiffs in contractual difficulties and litigation over existing contracts for the supplying of milk to them, *would result in the destruction of their established business* and would operate to deprive the plaintiffs of their property without due process of law."

Speaking of the question of the jurisdiction of the court upon such a bill, Judge Tuttle said:

> "*There can be no doubt of the power of this Court to enjoin the defendant,* although occupying the official position which he does, from attempting to enforce an unconstitutional criminal statute against the plaintiffs, in excess of his lawful authority and to their threatened and resultant irreparable injury, as alleged in the bill of complaint herein. *Philadelphia Co. vs. Stimson,* 223 U. S., 605, 56 L. Ed. 570, *William Cramp & Sons Ship & Engine Building Co. vs. International Curtis Marine Turbine Co.,* 246 U. S., 28, 62 L. Ed. 560.
>
> The commencement of various criminal prosecutions based upon alleged violation of the statutory provision here involved clearly indicates the intention of the defendant District Attorney to attempt the enforcement of this particular provision of the statute, *and shows beyond doubt the propriety and necessity of the injunction sought.*
>
> *Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them before invoking the equitable relief to which they are entitled under the circumstances.* *Vicksburg Water Works Co. vs. Vicksburg,* 186 U. S., 65, 46 L. Ed., 808; *Waite vs. Macy,* 246 U. S., 606, 62 L. Ed., 892."

A similar conclusion was reached by Judge Lewis of the District of Colorado in the two cases above cited against United States District Attorney Tedro. In the *Temple Fuel Company* case a coal company alleged that the conduct of its business was being interfered with by threatened prosecutions by the defendant United States District Attorney, and in the *Lewis & Sons Drygoods Company* case it was alleged that the drygoods business of the plaintiff was similarly being interfered with by threatened prosecutions. The court took jurisdiction in

both cases and granted injunctions against such threatened criminal proceedings.

The extent to which this Court has gone in holding that the right to conduct business is a property right within the protection of the Constitution of the United States is illustrated by the recent case of *International News Service vs. Associated Press*, 248 U. S., 215. This was a suit brought by the Associated Press against the International News Service to restrain and enjoin the pirating of news gathered by complainant organization and furnishing the same to its papers simultaneously with or immediately following the earliest publication of such news in such papers as had the Associated Press service. It was held by the Circuit Court of Appeals that an injunction should issue against the bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. The question was raised as to whether there was any property right in the current daily news gathered as such by the Associated Press. On this point the court said:

> "Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, *it must be regarded as quasi property*, irrespective of the rights of either as against the public."

As to jurisdiction of an equity court to protect a property right the court (decision by Justice Pitney) said:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. *The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a*

pecuniary nature as a property right. (*In re Sawyer*, 124 U. S., 200, 210; *In re Debs*, 158 U. S., 564, 593); *and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. Truax vs. Raich*, 239 U. S., 33, 37-38; *Brennan vs. United Hatters*, 73 N. J. L., 729, 742; *Barr vs. Essex Trades Council*, 53 N. J. Eq., 101. It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." (P. 236.)

In this case the Court referred to the earlier cases of *Board of Trade vs. Christy Grain & Stock Company*, 198 U. S., 236, 250, and *National Tel. News Co. vs. Western Union Tel. Co.*, 119 Fed., 294.

In the first of these two cases, the plaintiff's collection of board of trade quotations was held to be a property right which was entitled to protection in a court of equity.

In the second of these two cases, the issue was presented as to whether news matter gathered and transmitted by telegraph and consisting merely of a quotation of current events having an extremely transient value was property. Mr. Justice Pitney in delivering the opinion of the court in the *International News Service* case, *supra*, summarizes the holding by the Circuit Court of Appeals in the *National Tel. News Company* case, in the following language:

"*Nevertheless held that the business of gathering and communicating the news*—the service of purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business world, and *partaking of the nature of property in a sense that entitles it to the protection of a court of equity against piracy.*"

There are two notable decisions in this Court which, because of the peculiar facts therein involved, further illustrate how far this Court has gone in declaring that the right to be employed and to receive the earnings resulting from such employment is a property right entitling the parties in interest to protection in equity against unlawful interference by threatened criminal proceedings. We refer to the cases of *Truax vs. Reich*, 239 U. S., 33, and *Hammer vs. Dagenhart*, 247 U. S., 251.

In *Truax vs. Raich, supra*, a native of Austria, employed as a cook by defendant Truax, had brought a bill against his employer and *Jones, Attorney General of the State, and Gilmore, County Attorney*, to enjoin threatened prosecution of Truax for employing more employees who were aliens than was permitted under the Statute of Arizona, which statute the bill alleged was unconstitutional and void. Interlocutory injunction was issued and direct appeal was taken to the Supreme Court of the United States. Mr. Justice Hughes, in delivering the opinion of the court, said (page 37):

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecutions, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S., 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, *when the prevention of such prosecution is essential to the safeguarding of rights of property. Davis & Farnum Mfg. Co. vs. Los Angeles*, 189 U. S., 207, 218; *Dobbins vs. Los Angeles*, 195 U. S., 223, 241; *Ex parte Young, supra; Philadelphia Co. vs. Stimson, supra*, p. 621. *The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in*

the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. Moran vs. Dunphy, 177 Massachusetts, 485, 487; *Berry vs. Donovan,* 188 Massachusetts, 353; *Brennan vs. United Hatters,* 73 N. J. Law, 729, 743; *Perkins vs. Pendleton,* 90 Maine, 166; *Lucke vs. Clothing Cutters,* 77 Maryland, 396; *London Guar. & Acc. Co. vs. Horn,* 101 Ill. App., 355, S. C., 206 Illinois, 493; *Chipley vs. Atkinson,* 23 Florida, 206; *Blumenthal vs. Shaw,* 23 C. C. A., 290, S. C., 77 Fed. Rep., 954. It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe vs. Atchison, Topeka & Santa Fe Ry.,* 235 U. S., 151, 162); *that is, that the servant cannot complain for the master and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote.* It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence

we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

In *Hammer vs. Dagenhart, supra,* the bill was brought by a father on his own behalf and as the next friend of his two minor children to enjoin the enforcement of an Act of Congress prohibiting transportation in interstate commerce of goods manufactured by child labor, it being claimed that the employer of the plaintiff's minor children was likely to discharge them because of fear of prosecution under said act. It is stated by Judge Hand (259 Fed., 326) that the brief of complainants filed in the *Hammer* case discussed the question of jurisdiction of the court. Such jurisdiction was in any event assumed by the court in passing on the merits of the case.

C. THE RIGHT OF THE PLAINTIFFS TO EQUITABLE RELIEF IS NOT DEFEATED BY THE FACT THAT THEY HAVE AN ALLEGED REMEDY, UNLESS SUCH ALLEGED REMEDY IS COMPLETE AND ADEQUATE.

St. Louis & San Francisco R. R. Co. vs. McElvin, 253 Fed., 123.

In this case there was an application for an injunction to restrain McElvin from further prosecuting a suit at law against the railroad company. It was objected that the railroad company would have an adequate remedy at law in its defense to the suit in state courts, but the Court said:

"The adequate remedy at law which will prevent the maintenance of a suit in equity in a federal court is a remedy 'as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce vs. Grundy,* 3 Pet., 210, 215; *Oelrichs vs. Spain,* 15 Wal., 211; *Hayden*

vs. Thompson, 71 Fed., 60; *Springfield Milling Co. vs. Barnard & Leas Mfg. Co.,* 81 Fed., 261, 265; *Rogers Penobscot Mining Co.,* 154 Fed., 606, 613."

It will doubtless be urged that inasmuch as the constitutionality of the statute could be set up as a defense in any criminal proceeding, any parties charged in such proceedings had a complete remedy at law and could not base their claim to equitable relief on the alleged unconstitutionality of the statute. On this point we respectfully call the Court's attention to the case of *Dobbins vs. Los Angeles,* 195 U. S., 223, 242. In this case the Court said:

> "It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and settled by a decree of a court of equity."

Each sale of sugar made by the plaintiffs might be held to constitute a separate offense, and subject them to separate prosecutions and the heavy penalty provided by statute. These prosecutions would all involve the same issue—the constitutionality and scope of the Lever Law and that issue can be determined and finally disposed of in this equitable proceeding.

SECTION 4 OF THE LEVER LAW AS AMENDED IS INVALID AND UNCONSTITUTIONAL.

That all the war powers of Congress, however extensive and complete they may be, are subject to constitutional limitations, has been frequently decided by this Court.

Hamilton vs. Kentucky Distilleries Co., 251 U. S., 146, 156.

Mitchell vs. Harmony, 13 How., 115, 134.

Ex Parte Milligan, 4 Wal., 2, 120, 121.
United States vs. Russell, 13 Wal., 623, 627, 629.

In *Ex Parte Milligan*, the Court said, speaking of the protection afforded individual citizens accused of crime by the provisions of the Constitution and particularly by those found in the Fourth, Fifth and Sixth Amendments:

> "These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.
>
> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world has taught them that what was done in the past might be done in the future. *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be*

suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

In *Hamilton vs. Ky. Distilleries,* 251 U. S., 146 at 156, Mr. Justice Brandeis, in delivering the opinion of the court, said, at page 156:

"The war power of the United States, like its other powers and like the police power of the states, *is subject to applicable constitutional limitations* (*Ex Parte Milligan,* 4 Wall., 2, 121-127; *Monongahela Navigation Co. vs. United States,* 148 U. S., 312, 336; *U. S. vs. Joint Traffic Assoc.,* 171 U. S., 505, 571; *McCray vs. U. S.,* 195 U. S., 27, 61; *U. S. vs. Cress,* 243 U. S., 316, 326)."

Original Section 4 of the Lever Law contained no penalty, therefore does not of itself create an offense as that word is used in the criminal law and there is no general penalty law in the statute to cover it.

United States vs. Mossow, 261 Fed., 999.

SECTION 4 OF THE LEVER ACT AS AMENDED IS UNCONSTITUTIONAL BECAUSE OF ITS ARBITRARY CLASSIFICATION.

The provisos adopted in October 22, 1919, read:

"Provided that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stock man, or other agriculturist, with respect to the farm products produced or raised on land owned, leased or cultivated by him."

"Provided further that nothing in this act shall be construed to forbid or make unlawful collective

bargaining by any operative association or other association of farmers, dairymen, gardeners or other producers of farm products with respect to farm products produced or raised by its members upon land owned, leased or cultivated by them."

A great latitude of classification has been allowed under the Constitution of the United States, but there are limits, and there is one limit that has been precisely defined by this Court, and the case which defines that limit applies definitely to the present case. It is the case of *Connelly vs. Union Sewer Pipe Co.*, 184 U. S., 540. This case dealt with the anti-trust act of Illinois. It was a drastic statute and contained, near its end, this provision:

> "The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

It will be seen that the two classes involved are practically identical. This Court after recognizing the authority to classify said that under the arbitrary selection it could not be justified by causing a classification. Mr. Justice Harlan, in writing the opinion, used this language:

> "Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed. It is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful. Two or more engaged in selling drygoods, or groceries, or meats, or fuel, or clothing, or merchandise, are, under the statute, criminals, and

subject to a fine, if they confine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or are preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but that members who happen to be agriculturists and livestock raisers may make combinations of that character in reference to their grain or livestock without incurring the prescribed peñalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and livestock in Illinois constitute a very large part of the wealth and property of that state.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against legislative combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to these regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The Lever Act was a war act. Congress, in Section 1 of the Act, referred to the importance of an equitable distribution of foods and supplies. The equitable distribution of farm products was of the very essence and policy of the Lever Law. The provision exempting

farmers and making criminals of sugar dealers under the same circumstances we contend is arbitrary and un constitutional.

It may be contended that in the *Connolly* case the Court was dealing with the Fourteenth Amendment and the provision in that amendment as to the denial of the equal protection of the law. We contend that the Sixth Amendment, operative with respect to Congress, prohibiting the deprivation of property without due process of law, carries into it protection against an arbitrary classification of the sort that would condemn state action, under the equal protection clause of the Fourteenth Amendment. It has often been said by eminent jurists that there is no place in American government for the exercise of arbitrary power, and so far as federal action is concerned you have the provision of the Fifth Amendment as a guarantee against such action, and due process of law means the application of equal laws without arbitrary classification, as well as without the other deprivations within the content of that law.

It has been many times held that "due process of law" and "law of the land" express the same thought and have the same meaning. In *Davidson vs. New Orleans,* 96 U. S., 97, 101, Justice Miller said:

> "The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the Great Charter in connection with the writ of *habeas corpus* and trial by jury and other guaranties of the rights of the subject against the oppression of the Crown."

In *Missouri Pacific Railroad Co. vs. Humes,* Justice Field said:

> "In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the sub-

ject against the arbitrary action of the Crown and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land,' and a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property."

In *Scott vs. City of Toledo*, 36 Fed., 385, 393, Judge, later Mr. Justice Jackson citing *Cooley on Constitutional Limitations*, said:

"In a general sense 'due process of law' is identical in meaning with the phrase 'law of the land,' as used in the constitutions of the several states."

It has been frequently held that the phrase "law of the land," as used in the state constitutions, imports a general public law equally binding upon every member of the community and when applied to special or class legislation it means, in addition, that the classification must be natural and reasonable, and not arbitrary and capricious.

The words "due process of law" must have the same meaning in the Fifth and Fourteenth Amendments of the Constitution of the United States.

In *Hurtado vs. California*, 110 U. S., 516, this Court had before it the question whether or not a statute of California authorizing prosecutions for felonies by information without indictment by a grand jury was repugnant to the due process clause of the Fourteenth Amendment, and after comparing the two amendments calling attention to the provision for indictment by a grand jury, in the Fifth Amendment, said:

"The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent."

In *Caldwell vs. Texas*, 137 U. S., 692, 697, this Court had before it the validity of a state statute and said:

"By the Fourteenth Amendment, the powers of the States, in dealing with crime within their borders, are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisite is satisfied." (*2nd Kent's Comm.*, 13), "and due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principle of private right and distributive justice. (*Bank of Columbia vs. Okley*, 4 Wheat., 235, 244.)"

In *Leeper vs. Texas*, 139 U. S., 462, this Court said:

"It must be regarded as settled • • • that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law, in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike and not subjecting the individual to the ar-

bitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (*Hurtado vs. California*, 110 U. S., 516, 535 and cases cited.)

In *Giozza vs. Tierman*, 148 U. S., 657, this Court said:

"Due process of law is not secured within the meaning of the amendment unless the law operates on all alike, and does not subject the individual to an arbitrary exercise of the powers of the government."

McGeehee on *Due Process of Law*, page 60, says:

"Purely arbitrary decrees or enactments of legislature directed against individuals or classes are held not to be the law of the land or to conform to due process of law."

Willoughby on the *Constitution*, pp. 873, 874, says:

"The United States is not by the Constitution expressly forbidden to deny to anyone the equal protection of the laws, as are the statutes by the first section of the Fourteenth Amendment. It would seem however, that the broad interpretation which prohibition as to due process of law has received, is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus, it has been repeatedly declared that enactments of a legislative decree against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law, so far as their life, liberty or property is affected. One of the requirements of due process of law as stated by the Supreme Court is that the laws 'operate on all alike' and do not subject the individual to an arbitrary exercise of the powers of the government."

In *Murray's Lessee vs. Hoboken Land & Improvement Company*, 18 How., 272, 276, this Court said, in

speaking of the due process clause of the Fifth Amendment:

> "The article is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process due process of law by its mere will. The doctrine of the *Connolly* case, so far as we have been able to tell, has not been modified. This case has been frequently cited in other cases, and while cases have been distinguished the doctrine of the case has not been in any manner impaired or modified. The classification in amended Section Four of the Lever Law is arbitrary and not natural or reasonable and, we contend, repugnant to the due process clause of the Fifth Amendment of the Constitution, consequently void."

SECTION FOUR OF THE LEVER ACT AS AMENDED IS SO VAGUE AND INDEFINITE AS TO BE UNCONSTITUTIONAL.

Such a law does not constitute due process under the requirements of the Fifth Amendment to the Constitution of the United States, nor does it advise the accused of the nature and cause of the accusation brought against him with sufficient definiteness to comply with the requirements of the Sixth Amendment to the Constitution of the United States.

We have already referred to the vague and indefinite terms employed by this section of the Lever law. In order to give this section any reasonable interpretation or to prevent it to be held as purely arbitrary legislation within the prohibition of the Fifth Amendment to the Constitution, there must be read into its provisions the "rule of reason," which was read into the provisions of the Sherman law by this Court in the *Standard Oil* and

Tobacco cases. The offenses described in this section were not offenses of common law, and it was therefore necessary that the statute defining them should be so specific that all may know what is and what is not prohibited. The section makes unlawful that which was perfectly lawful prior to the enactment of the statute.

The judges who have sustained this provision of the Lever law have laid down such varying tests for determining whether there has been a violation thereof that they have clearly demonstrated the vagueness and indefiniteness of its provisions. By way of illustration, we will refer to several of these opinions. In *United States vs. Leonard*, District Judge Howell of the Northern District of New York held, that in determining whether or not a price was unreasonable the jury should take into consideration

> "what prices the defendants paid for the goods in the market, whether they bought them in the ordinary course of trade, paying the market price at the time of the purchase, the length of time the defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, but not how much the market price had advanced from the time the goods were purchased to the time they were sold."

In *United States vs. Oglesby Grocery Co.*, District Judge Sibley, of the Northern District of Georgia, Northern Division, said:

> "The words used by Congress in reference to a well established course of business fairly indicate the usual and established scale of prices and charges in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any departure

from the usual and established scale of charges and prices in time of peace which is not justified by some special circumstance of the commodity or dealer."

Judge McCall, of the Western District of Tennessee, in his charge to a grand jury, stated that if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 a pair,

"and then he sells both of those lots at $18 a pair, he is profiteering clearly upon the first lot that only cost him $8. Now he does that upon the theory that if he sells those shoes out and goes into the market and buys again that he will have to pay the higher price, but that does not excuse it. He is entitled to make a reasonable profit, but he certainly has not the right to take advantage of the former purchase and take the same profit as he gets on the $12 shoes."

In *United States vs. Myatt*, Judge Connor, for the Eastern District of North Carolina, says:

"It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit on sugar. The profit made is not the test, it may be entirely irrelevant to the guilt of the defendant; he may within the language of the statute, make an unreasonable and therefore unlawful rate or charge without making any profit or the rate or charge made may involve a loss to him upon the purchasing price."

District Judge Hand, of the Northern District of New York, in his charge to the grand jury, said:

"Furthermore it is not the particular profits that the individual himself makes which are the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit, not to him but if established generally in the trade. The law does not mean to say that all people shall charge

the same profit. If I am a particularly skilled merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much I am allowed. But if I am charging more than a reasonable charge, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss."

In *United States vs. Goldberg, et al.*, District Judge Bledsoe of the Southern District of California, charged the jury that in passing on the question of the reasonableness of the price for sugar, the jury should take into consideration, among other circumstances, the following:

> "That there was, if you find that there was, a market price here in the community, or generally, with respect of the profit that normally should be made on sugar sold either by the manufacturer or jobbers and retailers."

These cases indicate that a great variety of tests were laid down for determining what is a reasonable price. According to Judge Howell, *United States vs. Leonard*, the jury cannot take into consideration the present market price of the goods; while according to Judge Bledsoe, in *U. S. vs. Goldberg*, they must take into consideration such market prices. According to Judge Sibley, in *U. S. vs. Oglesby Grocery Company*, the reasonableness of prices charged in time of war is to be determined with a view of what were reasonable prices in times of peace.

We respectfully submit that the conflicting tests laid down by the several judges who have sustained the constitutionality of Section Four of the Lever law demonstrate in a most forcible manner the vagueness and indefiniteness of the language there used. Some of these opinions are directly in conflict to that announced by this

Court in the case of *International Harvester Company vs. Kentucky*, 234 U. S., 216. In that case the Court held unconstitutional a state statute which made it a crime to charge more than the "real value" of the article sold, and said:

> "But if business is to go on, men must unite to do it and to sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent, to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The rule of the *Tozer* case, (*Tozer vs. U. S.*, 52 Fed., 917) has not been overruled by the doctrine of the *Nash* case.

The rule laid down in the *Tozer* case is stated by this Court in *U. S. vs. Reese*, 92 U. S., 214, where Chief Justice Waite said:

> "If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime,"

and also in *U. S. vs. Brewer*, 139 U. S., 279, where Mr. Justice Blatchford said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. (*U. S. vs. Sharpe*, Pet. C. C., 118.)"

In the case of *Hocking Valley Ry. Co. vs. U. S.*, 210 Fed., 735, 745, the Circuit Court of Appeals for the Sixth

Circuit cites the *Tozer* case in support of the doctrine above referred to.

This Court, in the cases of *International Harvester Co. vs. Kentucky*, 234 U. S., 216, and *Collins vs. U. S.*, 234 U. S., 634, held that the criminal statute there before the court was unconstitutional and void because of its vagueness, and that the earlier decision of *Nash vs. U. S.*, 229 U. S., 373, was not in conflict with such holdings; that is to say, this Court held in these two cases that the rule of the *Tozer* case still is to be applied to criminal statutes.

The *Nash* case had to do with the offenses based upon "restraints of trade" and "monopoly" which had long been defined by the common law and it was held that the statute therefore was not subject to the objection of vagueness and indefiniteness. An examination of the decision of this Court in the *Standard Oil case*, 221 U. S., 1, confirms this view that the Court relied upon the common law definitions of "restraint of trade" and "monopoly," which definitions the Court held must be read into and in effect made a part of the Sherman law.

The offenses created by the Lever Law are new offenses. We have heard no one contend that such a statute could be passed in peace times. The offenses were not offenses at common law, and consequently the vagueness of the terms of the statute cannot be cured or aided by any pre-existing definitions.

The case of *Waters-Pierce Oil Company vs. Texas*, 212 U. S., 86, was not in any sense a criminal case, and consequently the Sixth Amendment to the Constitution was not involved. Furthermore, the statute assailed had to do with "restraints of trade," and therefore fell within the same category as the Sherman law and within the doctrine laid down in the *Nash* case.

In the various arguments made in the lower courts concerning the validity of Section Four and similar sections of the Lever Law, counsel for the government largely relied upon such cases as *Miller vs. Strahl*, 239 U. S., 426, *LeRoy Fiber Company vs. C. M. & St. P. Ry. Co.*, 232 U. S., 340, *Fox vs. Washington*, 236 U. S., 277, *Omaechvarria vs. Idaho*, 246 U. S., 343, *Tyomeis Publishing Co. vs. U. S.*, 211 Fed., 385, *U. S. vs. United States Brewers' Association*, 239 Fed., 163, *Lamar vs. U. S.*, 260 Fed., 561.

An examination of these cases will develop that the statutes involved were held to refer to some standard well established in law. *Miller vs. Strahl* was a civil suit for damages based upon the negligence of a hotel keeper. Attack was particularly made upon a provision of the statute requiring the hotel keepers "to do all in their power to save such guests and inmates." This Court said:

> "And what better test could be devised than that of doing all in one's power as determined by the circumstances"

and in that connection the *Nash* case was cited.

The case of *LeRoy Fiber Company vs. C. M. & St. P. Ry. Co.*, 232 U. S., 340, was not a criminal case, but involved the question whether the plaintiff was negligent in storing flax near a railroad right of way. The Court held that no negligence could be imputed to the plaintiff for using his own premises in a legitimate manner.

In *Fox vs. Washington, supra,* a statute of the State of Washington condemned as criminal any person who should by printed matter encourage an actual breach of the law. Mr. Justice Holmes, in delivering the opinion, said (page 277):

"We understand the state court, by implication at least, to have read the statute as confined to encourage an actual breach of law. Therefore, the argument that this act is both an unjustified restriction of liberty, and too vague for a criminal law, must fail."

In *Omaechvarria vs. Idaho, supra,* where the statute of Idaho forbade the grazing of sheep on ranges usually occupied by cattle, the necessary standard or test was supplied by the well-known customs and experiences in such grazing communities. As the Court pointed out, men familiar with range conditions would have no difficulty in determining which ranges were so used for sheep grazing, therefore it was not vague in reality but gave all persons proper notice of what they were forbidden to do.

The Court pointed out that the expressions used in the act in question are common in other criminal statutes and therefore naturally cited the *Nash* case where the holding of the Court was that the expressions used in the Sherman Act were commonly used and had definite meanings at common law.

In *Tyomies Publishing Company vs. U. S.,* the Court merely decided that Section 211 of the Federal Criminal Code forbidding the sending through the mails of obscene, lewd, lascivious or filthy matter, was sufficiently definite for criminal prosecution.

U. S. vs. United States Brewers' Association, supra, dealt with an indictment charging the defendants with conspiracy to make money contributions in connection with an election with which representatives in Congress were to be chosen. The point was made that the statute was vague and uncertain because it failed to define wnat were money contributions. The District Judge in sus-

taining the indictment cited the *Nash* case to the effect that the question was one of the construction of the act and did not go to its constitutionality, and held that the words "money contributions" are not vague and uncertain and that their meaning is plain.

Lamar vs. U. S., supra, involved an indictment under the Sherman law. The indictment was not set out, but the Court says it was in the same form approved in the *Nash* case and being under the same law involved in that case naturally held the indictment good.

CONCLUSION.

For the reasons which we have outlined in this brief, we contend, first, that the provisions of Section Four of the Lever Law, both in the original and amended form, so far as they are the basis for an indictment, are too vague and indefinite in general to constitute a valid definition of a crime. Secondly, we contend that Section Four when amended by the Act of October 22, 1919, had written into it a proviso which constituted an absolutely arbitrary piece of legislation. And we further contend that Congress can neither in time of peace nor in time of war, violate the provisions of the Fifth and Sixth Amendments to the Constitution and create a criminal offense without suitable certainty and definition.

As we have endeavored to show, the District Court had jurisdiction to prevent the irreparable injury to the plaintiffs below, and we respectfully urge that the appellants are entitled to the relief prayed for.

Respectfully submitted,

WILLIAM L. DAY

JOSEPH G. FOGG,

Solicitors.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE G. S. WILLARD COMPANY, HENRY S. Narten, Perry F. Narten, and W. A. Duff, Appellants,

v.

A. MITCHELL PALMER, AS ATTORNEY GENERAL of the United States, and Edwin S. Wertz, as United States district attorney for the Northern District of Ohio.

No. 418.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLEES.

This is a suit to enjoin Federal officers from enforcing, through criminal prosecutions, the Lever Act of August 10, 1917 (40 Stat., c. 53, p. 276), as amended by section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297).

The right to an injunction is predicated upon the contention that the act in question is unconstitutional.

The grounds upon which the act is assailed are:

1. That by the exemption in favor of farmers and others it contains arbitrary and unconstitutional classification.

2. That it is so vague and indefinite as to be unconstitutional.

These are the same objections urged against the act in the cases of *United States* v. *L. Cohen Grocery Company*, No. 324; *Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, No. 357; and *Kennington* v. *Palmer, Attorney General*, No. 367, which are to be heard at the same time with this case. The Government's argument in reply is fuliy set out in the briefs filed in those cases and need not now be repeated. Those briefs are referred to and adopted as the Government's brief in this case.

It is respectfully submitted that the decree of the District Court dismissing the bill is correct and should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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G. S. WILLARD COMPANY ET AL. *v.* PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 418. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
Reversed.

THIS was a suit by a corporation, a dealer in sugar, and officers and stockholders, to enjoin criminal proceedings under the Food Control Act. Plaintiffs appealed directly from a decree dismissing the bill.

Mr. William L. Day and *Mr. Joseph G. Fogg*, for appellants, submitted.

The Solicitor General for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In this case the complainants filed their bill to enjoin the Attorney General and the United States Attorney from taking steps to enforce against them provisions of the fourth section of the Lever Act, on the ground, among others, of their repugnancy to the Constitution of the United States because of their vagueness and want of constitutional standard. On motion, the court dismissed the bill for want of equity, and the case is here by direct appeal.

It presents the question under the Constitution which was this day decided in the *Cohen Grocery Co. Case, ante*, 81, that is, the repugnancy of the provisions relied upon to the Constitution, and therefore, as a result of the ruling in that case, the decree below must be reversed and the case remanded for further proceedings in conformity with this opinion and it is so ordered.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE DAY took no part in the consideration or decision of this case.